Thomson C.J. (delivering oral judgment): I entirely agree with everything my Lord has said.

I only wish to add one word.

I do not imagine that this case is likely to go elsewhere. My experience of local litigation, however, suggests to me that we may hear a great deal about it here in the future, and that being so I think I should make it clear that in my view we are not treating the decisions of the English Court of Appeal in *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [1] and in *France* v. *Parkinson* [3] as laying down any rule of law but rather as illustrative of the application of principles of logic and common sense to circumstances which do not infrequently arise.

The present appeal is dismissed with costs and there will be an order for payment out of the deposit to the respondent against his taxed costs.

Hill J.A. concurred.

Appeal dismissed.

JOHN v. DHARMARATNAM

[C.A. (Thomson C.J., Good J.A. and Ong J.) September 24, 1961]

[J.B. — F.M. Civil Appeal No. 10 of 1961]

Libel and Slander — Damages — Pecuniary loss suffered as a result of libel — Proof of.

Practice and Procedure — R.S.C., O.36 r.37 — Operation of rule.

In an action for damages for pecuniary loss suffered as a result of libel it is for the party who brings such action to prove the damages that he has suffered.

Order 36 rule 37 can only operate to cut out evidence which it is sought to put in solely for the purpose of mitigating damages and cannot be read so as to keep out evidence which is otherwise relevant but which could incidentally have some effect on the quantum of damages.

Cases referred to:—

(1) *Bonham-Carter* v. *Hyde Park Hotel Ltd.* 64, T.L.R. 177, 178.

(2) *Scott* v. *Sampson* 8 Q.B.D. 491.

COURT OF APPEAL.

Keith Sellar for the appellant.

J. F. McWilliam for the respondent.

Good J.A. (delivering oral judgment): The appellant who was the plaintiff in the Court below was awarded $500 damages for the injury to his reputation which the law presumes in the case of a libel on a man in the way of his business, trade or profession but in addition he claims damages for particular pecuniary losses which he attributes to the fact of the libel. The learned trial judge considered this question and considered it with some care. The appellant has submitted that the judge misdirected himself in two respects, one of which is a negative one and the other a positive one: that he did not take into account these losses from the plaintiff's business in assessing damages, and that he did take into account a number of other matters which he considered might have been responsible for these losses. Speaking for myself I do not think that the appellant established any connection between the publication of the libel by the defendant and the loss of revenue from his business which occurred after that publication. He no doubt could, and the learned trial judge thought he should, have adduced evidence if indeed the losses were due to the libel.

My attention has been drawn to a passage from the judgment of Lord Goddard in *Bonham-Carter* v. *Hyde Park Hotel Ltd.* [1] which to me appears to be very apt in the circumstances of the present case where the learned Lord Chief Justice said:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

The appellant's counsel in the appeal before us has not gone so far as to suggest that there is any presumption of law that the losses alleged by the appellant were due to the libel but he has asked us to draw the inference that they were; and while it is a possible inference it is of course not an exclusive one and there are a number of other possible reasons for these losses both in the record of the evidence and other speculative ones.

In all the circumstances I am of the opinion that the learned trial judge was correct in not awarding any sum specifically for these alleged losses of income and that leaves us with the $500 general damages. Again, speaking for myself, I would have awarded that amount or more or less but I cannot see that there is any manifest error in the amount awarded and I would not be disposed to interfere with the amount so awarded. I would therefore dismiss the appeal with costs.

Thomson C.J. (delivering oral judgment): I agree with what my Lord has said and would only, out of regard to the argument which Mr. Sellar has addressed to us, say a few words regarding the interpretation of Order 36 rule 37.

I think it is clear beyond any question that that rule which was enacted subsequent to the decision of the Court of Queen's Bench in *Scott* v. *Sampson* [2] was enacted in consequence of what was said in that case and that being so I think we have to read it with Order 19 rule 4 and Order 21 rule 4.

Order 19 rule 4 is a rule we are all familiar with. "Every pleading shall contain.....a statement in a summary form of the facts on which the party pleading relies for his claim or defence" and then Order 21 rule 4 says in general terms: "No denial or defence shall be necessary as to damages claimed or their amount: but they shall be deemed to be put in

issue in all cases, unless expressly admitted". As was in effect pointed out in *Scott* v. *Sampson, supra,* both by Mathew J., and Cave J., the rules as they stood at that time (in 1882) could operate so as to cause injustice in cases of libel where it was thought necessary to call evidence which might operate to mitigate damages. Presumably, it was in consequence of that that Order 36 rule 37 was enacted. It reads:—

"In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the Judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."

To my mind, considering the history of the matter, the rule can only operate to cut out evidence which it is sought to put in solely for the purpose of mitigating damages and cannot be read so as to keep out evidence which is otherwise relevant but which could incidentally have some effect on the quantum of damages. In the present case the defendant did not seek to justify. His main defence was a defence of privilege and the evidence in question was relevant to the question of privilege. He said in effect that it was his duty to tell the District Council what he did tell them. The judge held he was wrong in thinking that he was under any such duty but the evidence complained of was clearly relevant to that issue and admissible as such. It may have some effect on the judge's mind in assessing damages but as it was not directed exclusively to the issue of damages it was not struck at by Order 36 rule 37.

Ong J.: I agree with the judgments just delivered by my Lords and have nothing to add.

Appeal dismissed.

Solicitors: *Sault, Keith Sellar & Co.; P. T. Wong & Co.*

KERPA SINGH v. BARIAM SINGH & ANOR.

[C.A. (Thomson C.J., Barakbah and Azmi JJ.) October 21, 1961]

[Kuala Trengganu — F.M. Civil Appeal No. 14 of 1961]

Tort — Trespass to the person — Incised wounds on head — Medical evidence as to wounds — Inference as to weapon used.

The plaintiff in an action for damages for assault alleged that the defendants waylaid and assaulted him. He also stated that just before he was attacked by the defendants two Malays came out of the jungle and attempted to attack him and that he drove them off with a stick. The medical evidence disclosed incised wounds on the left mastoid region and forehead; a broken shoulder blade and other injuries. The doctor who examined the plaintiff stated that the head injuries could have been inflicted with an axe. The learned trial judge held that the injuries were inflicted by the two anonymous Malays on the instigation of the defendants. On appeal, the defendants relied on a defence of alibi.

Held: (1) there was no evidence to support the finding of the learned trial judge that the two anonymous Malays had caused the injuries;

(2) it was not at all certain that the head injuries had been caused with an axe for the medical evidence was that they could have been caused with an axe not that they were caused by an axe.

COURT OF APPEAL.

H. L. Wrigglesworth for the appellant.

N. A. Marjoribanks for the respondents.

Cur. Adv. Vult.

Thomson C.J.: The plaintiff in this case is a milk vendor residing near Kota Bharu in Kelantan. On the night of 7th July, 1959, he was returning home after dark when he was attacked by some person or persons armed with weapons of some sort and sustained personal injuries which, though no doubt severe, did not at any time place his life in danger.

It was the plaintiff's case that the persons who attacked him and injured him were the defendants, both of whom like himself are Sikhs, and in due course after they had been prosecuted criminally he sued them for damages. The action, of course, was for trespass to the person.

In his statement of claim the plaintiff alleged that the defendants together assaulted and beat him, the first defendant struck him with an axe and the second defendant struck him with a stick. At the trial he followed but elaborated his pleading. He said that on the night in question he was returning home on his bicycle when two Malays came out of the jungle and made to attack him. He drove them off with a stick and as they fled the two defendants came out of the jungle. The first defendant struck him two blows with an axe behind the left ear and on the forehead and as he turned to run towards a neighbouring house the second defendant struck him several times on the back with a stick, one of the blows breaking the right shoulder blade.

There was medical evidence to the effect that the plaintiff was examined at the hospital shortly after the attack on him and was found to have an incised wound over the left mastoid region and an incised wound on the forehead, both of which could have been caused by the sharp cutting edge of an axe, and a number of other injuries including a broken shoulder blade which could have been caused either by a fall or by blows with a stick. There is also evidence that some time later at a meeting of the local Sikh community there was some sort of admission of liability by both the defendants.

The defences as pleaded were in the first place *non facit* and in the second place, and in the alternative, that at the meeting of the Sikh community the plaintiff's claim against the defendants had been "settled" by mutual agreement. At the trial the second and alternative defence was abandoned and both defendants relied on a defence of alibi, they were not there and they did not know anything about the affair and had nothing whatsoever to do with it. They did, however, admit there had been some sort of previous trouble between them and the plaintiff.